Supreme Court, U.S.
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No. 87-890

In The
Supreme Court of the United States
October Term, 1987

WALTER A. WALKER, JR.,

Petitioner,

vs.

CONSUMERS POWER COMPANY, a Michigan Corporation,

Respondent.

RESPONSE TO A PETITION FOR WRIT OF CERTIORARI AND REQUEST FOR SUMMARY REVERSAL TO THE UNITED STATES SUPREME COURT

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COUNTER STATEMENT OF QUESTION PRESENTED

Whether certiorari should be granted to Petitioner when the decision of the Court of Appeals with regard to Petitioner's claim under state law of alleged breach of employment contract is consistent with the usual course of judicial proceedings, consistent with prior federal and state case law, and consistent with the parties' rights to civil trial by jury and due process.

DESIGNATION OF CORPORATE RELATIONSHIPS

Consumers Power Company, filing this Brief in Opposition to the Petition for Writ of Certiorari as Respondent in this proceeding, states that:

This is its original Designation of Corporate Relationships.

The CMS Energy Corporation is the parent of Consumers Power Company.

Consumers Power Company does not have an ownership interest in any subsidiaries (excepting only wholly-owned subsidiaries). CMS Energy Corporation does not have an ownership interest in any subsidiaries (excepting wholly owned subsidiaries).

Consumers Power Company and certain of its subsidiaries are affiliated (as Respondent understands the terminology of Supreme Court Rule 28.1), with the MCV Limited Partnership.

Dated: December 3, 1987.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 824 F.2d 499 (6th Cir. 1987).

COUNTER STATEMENT OF THE CASE

On August 12, 1980, Petitioner Walter A. Walker filed a Complaint against his former employer, Respondent Consumers Power Company, in the Federal District Court for the Eastern District of Michigan. Petitioner began employment with the Respondent in Jackson, Michigan, as an Associate Engineer in the Nuclear-Fuel Supply Department on March 15, 1971. He was discharged from his job as a Senior Engineer in the Nuclear-Fuel Supply Department on March 19, 1980.

On or about July 21, 1981, pursuant to permission given by the District Court, Mr. Walker filed his "First Amended Complaint" which contained five counts.

As a result of a Motion to Dismiss and/or for Summary Judgment filed by Respondent on July 13, 1982, the District Court on September 24, 1982, issued its Order dismissing certain portions of Petitioner's First Amended Complaint. The Order left intact portions of Counts I, II and III of the First Amended Complaint which claimed, respectively, a violation of 42 U.S.C. 1981, a breach of an alleged employment contract and the tort of "fraudulent misrepresentation".

Trial in this matter commenced before Judge Charles Joiner on Monday, May 7, 1984. Trial continued on May

7, 8, 9, 10, 11, 14, 29, 30, 31, June 1, 4, 5, and 6, 1984. On June 1, 1984, Respondent made a Motion for Directed Verdict as to all three Counts remaining in the First Amended Complaint, including the claim for breach of an alleged employment contract under Michigan law. The District Court granted the Motion for Directed Verdict as to the claim for fraudulent misrepresentation, but denied the Motion with regard to the claim for breach of employment contract and the claim of a 42 U.S.C. 1981 violation. (Court of Appeals Joint Appendix—Vol. 1 (hereinafter "JA1"), p. 198.

On June 4, 1984, at the conclusion of proofs, the Motion for Directed Verdict was renewed as to the two remaining Counts of the First Amended Complaint. The Motion was denied by the Federal District Court (JA1-209).

On June 5, 1984, Respondent made additional motions to the District Court with regard to the context in which the case was to be presented to the jury. On the same day the jury was instructed. Objections were made by the Respondent to most of the Court's instructions to the jury on the claim for breach of employment contract (JA1-230, et. seq.). Petitioner made no objections to the jury instructions (JA1-260).

Consequently, the case was submitted to the jury on the first two counts of the First Amended Complaint, i.e., alleged violation of Plaintiff's civil rights under 42 U.S.C. 1981, and alleged breach of employment contract under Michigan law.

On June 6, 1984, the jury returned with its verdict. The jury found that the Defendant did not deny the Plain-

tiff certain employment benefits claimed by him or terminate Plaintiff's employment as a proximate result of racially discriminatory motives. The jury then did find that the "Defendant breached an employment contract with the Plaintiff in not giving him certain employment benefits claimed by him or in terminating his employment all as explained in these instructions". The jury awarded compensatory damages in the amount of $1,194,600. (JA1-268).

Subsequent thereto, Respondent's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, For a New Trial or Remittitur was heard and denied by the District Court on August 7, 1984. An Order to that effect was entered on August 17, 1984 and an Amended Judgment was thereafter entered by the Court on September 4, 1984 in favor of Petitioner.

On September 6, 1984, the Respondent filed with the United States Court of Appeals for the Sixth Circuit its Notice of Appeal from the verdict of the jury, from the Amended Judgment entered on September 4, 1984, and from the Order denying Respondent's Motion for Judgment NOV or in the Alternative, for a New Trial or Remittitur.

The Petitioner did not appeal the Judgment of the trial court.

The case was subsequently briefed and submitted to the Court of Appeals by the parties in accord with the Federal Rules of Appellate Procedure. The case was orally argued before the Court of Appeals on March 7, 1986. A decision was rendered by the Court of Appeals for the

Sixth Circuit on July 27, 1987 (*See Walker v. Consumers Power Co.*, 824 F.2d 499 (6th Cir. 1987)).

The primary holding of the Sixth Circuit Court of Appeals was as follows:

> . . . Accordingly, we conclude that it was error for the trial court to have submitted to the jury the issue of failure to promote and grant certain compensation, and to have permitted an award and computation of damages based upon the breach of any such promise. Further, because the actual award of damages could only have been justified, if at all, by including therein the loss of salary increases and promotion, we cannot find that the admission of such evidence was harmless or that it did not affect either the determination of liability or the amount of damages. 824 F.2d 499, 502.

Consequently, the Court of Appeals remanded Petitioner's case for a new trial limited to the issue under Michigan law of whether Respondent Consumers Power breached an employment contract with Petitioner by discharging him without just cause (*See* 824 F.2d 505).

On or about August 6, 1987, Petitioner filed with the Sixth Circuit Court of Appeals his "Suggestions for Rehearing En Banc". On September 10, 1987, the Sixth Circuit entered its Order denying the Petition for Rehearing En Banc after circulation to all active judges on the court.

Petitioner subsequently apparently filed his Petition for a Writ of Certiorari in this Court on or about November 9, 1987. The Petitioner apparently alleges that the decision of the Sixth Circuit Court of Appeals in this matter constituted, under Supreme Court Rule 17(a), a departure

" . . . from the accepted and usual course of judicial proceedings," or a sanctioning of such a "departure" by a lower court.

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ARGUMENT

Petitioner apparently alleges that the facts of this case constitute "special and important reasons" to grant the writ within the meaning of United States Supreme Court Rule 17. There are at least three reasons why the instant case does not present "special and important reasons" requiring a grant of a Petition for Writ of Certiorari.

First, the decision of the Court of Appeals is in accord with prior state and federal case law pertinent to the issues presented upon appeal by Respondent to the Sixth Circuit.

It was the Respondent's position upon appeal that the Federal District Court had improperly allowed Plaintiff to submit to the jury a breach of job contract claim based upon an alleged promise of "future titles and pay". It was Respondent's position that submission of such a question to the jury was improper under the Michigan case of *Toussaint v. Blue Cross and Blue Shield of Michigan*, 408 Mich 578, 292 N.W.2d 880 (1980) for the reason that *Toussaint, supra,* and its progeny did not allow such a claim. Respondent further contended upon appeal that Petitioner in the instant case submitted insufficient evidence in support of such a claim.

The Court of Appeals characterized the case presented to the jury as follows:

> . . . In describing plaintiff's position to the jury in the course of his closing instructions, the trial judge stated:
>
> > Plaintiff claims that when he took the position with defendant, he was assured that he would be fired only for just cause, and that he would receive promotions and salary increases commensurate with his performance. Plaintiff claims that he entered into a contract of employment with defendant, and that defendant's failure to promote him and provide him with salary increases, and defendant's termination of his employment, constituted breaches of that employment contract.
>
> It is clear that the trial court submitted to the jury as a matter of Michigan law Walker's claim that he was entitled to a favorable verdict if it found that a two-pronged contract had been established. The Court therefore permitted recovery and damages to be based upon losses from both alleged breaches. 824 F.2d 499, 500-501.

In so describing, the Court of Appeals quoted the language of Instruction No. 37 given by the Trial Judge and objected to by Respondent.

In *Valentine v. General American Credit, Inc*, 420 Mich. 256, 362 N.W.2d 628 (1984), the Michigan Supreme Court, in interpreting *Toussaint, supra*, indicated that:

> . . . The only right held in *Toussaint* to be enforceable was the right that arose out of the promise not to terminate except for cause. 420 Mich. 256, 258.

Subsequently, in the case of *MSEA v. Department of Mental Health*, 421 Mich. 152, 365 N.W.2d 93 (1984), the Michigan Supreme Court indicated that:

> . . . The legal protection of employee interests in job security is the exception, rather than the rule, in this state. 421 Mich. 152, 158.

The decision of the Court of Appeals accurately recognized that there were a number of cases wherein Michigan courts had refrained from creating a cause of action for breach of an implied promise to promote or grant salary increases. *See,* 824 F.2d 499, 501 and cases cited therein, including *Dzierwa v. Michigan Oil Company,* 152 Mich. App. 281, 393 N.W.2d 610 (1986); *Sepanske v. Bendix Corp.*, 147 Mich. App. 819, 384 N.W.2d 54 (1985), appeal granted sub nom. *Teper v. Park West Galaries, Inc.*, 428 Mich 873, 402 N.W.2d 469 (1987); *Bullock v. Automobile Club of Michigan*, 146 Mich. App. 711, 381 N.W.2d 793 (1985), appeal pending.

The Sixth Circuit Court of Appeals therefore found that Petitioner herein, as a matter of law, had failed to submit sufficient evidence in support of a claim for breach of implied promise to promote or grant salary increases. Relying on the cases of *Vandendries v. General Motors Corp.*, 130 Mich. App. 195, 343 N.W.2d 4 (1983), and *Dabrowski v. Warner-Lambert Co.*, 815 F.2d 1076 (6th Cir. 1987), as well as the cases cited above, the Court of Appeals found as follows:

> . . . We conclude that the uncontradictory testimony of Walker himself concerning statements made by Consumers Power employees shows that such statements would be insufficient as a matter of law to give rise to an enforceable promise for a specific position or salary . . . The statements offered by Walker in support of his claim simply constituted general assurances that he would receive rewards commensurate with his contributions. Such statements indicate no more than what any employee may hope for if that employee remains with the company . . . 824 F.2d 499, 501-502.

Having reached such conclusion, the Court of Appeals was required to reverse and remand the matter for a new trial. Federal case law strongly suggests that the prejudicial and improper admission of evidence is a ground for a new trial (*See* for instance, *White v. Cohen,* 635 F.2d 761 (9th Cir. 1981); *Juneau Square Corp v. First Wisconsin National Bank of Milwaukee,* 624 F.2d 798 (7th Cir. 1980) cert. den., 449 U.S. 1013, 66 L. Ed. 2d 472, 101 Sup. Ct. 571 (1980)). As a result, the Court of Appeals in this case quite properly granted Respondent a new trial on the narrow issue of whether or not Petitioner was wrongfully terminated from his employment at Consumers Power without just cause under Michigan law.

The second reason why the writ should not be granted is because, contrary to Petitioner's apparent assertions at page 30 of his submission to this Court, there was no "cover-up" by either the Court of Appeals or the Federal District Court.

Petitioner apparently asserts that the Federal District Court, which upheld his jury award of almost 1.2 million dollars, as well as the Court of Appeals, which remanded the matter for new trial, have somehow "covered-up" the true circumstances of this case as a result of "malice".

Such assertion is simply not true. The trial court gave Petitioner ample opportunity to express his views both through written and oral arguments before and during trial. The trial court gave Petitioner ample opportunity to present his case through submission of oral and documentary evidence. The record below substantiates those

facts no matter how hard Petitioner may try to ignore them.

At the Court of Appeals, Petitioner was given every opportunity to raise both orally and in writing any and all arguments he had in this matter. Petitioner took full advantage of such opportunity, even though he failed to appeal the trial court verdict.

Petitioner then apparently suggests that the Court of Appeals failed to adequately review the record below. He does so by advancing in his Petition a number of seemingly irrelevant arguments which are not responsive to the issues raised by Respondent in the trial court and upon appeal. In so doing, Petitioner completely ignores his specific trial testimony relied upon by the Court of Appeals in its decision.

At 824 F.2d 502, the Court of Appeals specifically cites the trial testimony of Petitioner on May 8, 1984, May 11, 1984, May 14, 1984 and May 29, 1984 in resolving the issues raised by Respondent on appeal with regard to the claim for breach of contract based on "future promotions". Nowhere in the Petition before this Court is there a rebuttal of the specific trial testimony by Petitioner which established the inadequacy of his claim for future promotions and pay. As a result, Petitioner's apparent claim that some relevant "facts" were ignored by the Court of Appeals as a result of "malice" is simply not borne out by either the record below or the Petition before this Court.[1]

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[1] The allegations of page 63 of the "Petition" are also not supported in the record. The Court of Appeals, in its order filed April 17, 1985, found that the trial transcript had been

(Continued on next page)

The third reason why the Petition should not be granted is because the ruling of the Court of Appeals is consistent with the parties' rights to civil trial by jury and due process.

Petitioner apparently asserts that his rights to trial by jury and due process were abrogated as a result of the Court of Appeals' opinion in this matter. A review of the Petition and the Court of Appeals decision fails to substantiate this assertion, which is made for the first time before this Court.

To the contrary, the Court of Appeals' decision confirmed Petitioner's right to trial by jury. It confirmed his right to proceed to a new trial on the issue of Michigan law involved with his claim of breach of his employment contract.

Similarly, Petitioner's claims of a violation of his due process rights do not survive scrutiny. Such claims are apparently primarily based on Petitioner's assertion that District Judge Joiner should never have given instruction number 37 to the jury. (See Petition, page 31, 35, 36-63). It is instruction number 37 which the Court of Appeals

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(Continued from previous page)

properly requested under the applicable rules and that the escrow agreement established and supervised by the District Court after motion and oral argument was in compliance with the applicable rules. As to the accuracy of the transcript of the post-verdict Judgment NOV hearing of August 7, 1984, the Court of Appeals order of July 18, 1985, did not "accept" a "falsified" transcript, but rather invited the Petitioner to pursue the matter of the transcript's accuracy with the District Court under FRAP 10(e). Petitioner failed to pursue the matter.

cites as demonstrating that the jury was improperly allowed to consider the "future promotions and pay" issue under state law. (824 F.2d 500). Petitioner herein apparently agrees that the instruction was improper, but apparently alleges the Court of Appeals had no right to remand once it decided the same thing.

The giving of an erroneous instruction or failure to give a properly requested instruction is grounds for a new trial, provided the party moving for a new trial made an objection before the jury retired to consider its verdict and stated distinctly the grounds upon which it objected (*See,* for instance, *Callen v. Pennsylvania R.R. Co.*, 332 U.S. 625, 92 L. Ed. 242, 68 S. Ct. 296 (1948); *Bentley v. Stromberg-Carlson Corp.*, 638 F.2d 9 (2nd Cir., 1981); 6A Moore, et. al., *Moore's Federal Practice,* ¶ 59.08[2]).

What Petitioner ignores is the fact that he never objected to any instruction at trial nor made any attempt on the record to cure it. (See JA1-260). Rather, it was Respondent which objected and preserved the issue for appeal. As a result, Petitioner cannot now claim violation of any alleged due process rights as a result of the giving of erroneous instructions.

In alleging a denial of his right to trial by jury and due process, Petitioner further ignores the fact that he never perfected an appeal to the Court of Appeals on any issue raised or result reached in the trial court. (*See* Federal Rules of Civil Procedure 50(b), 59; Federal Rules of Appellate Procedure 3, 4, 27(a); 28 U.S.C. § 1291; 9 Moore, et. al., *Moore's Federal Practice,* ¶ 204.02, 204.11). Despite this fact, the Court of Appeals examined the totality of the case and found no other error:

> . . . Prior to the trial court granting defendant's motion for a directed verdict on the claim for fraudulent misrepresentation, and at the close of trial the jury returned a verdict in favor of Consumers Power on the 1981 claim. No cross-appeal has been taken nor does this appeal reveal any errors in the rulings with respect to Counts 1 or 3, which would require us to disturb those results . . . 824 F.2d 499, 500.

Petitioner obviously disagrees with the result reached by the Court of Appeals. Yet the Court of Appeals decision amply demonstrates that the Petitioner did exercise his right to trial by jury and that such right has been preserved for him. The decision further demonstrates that the Petitioner's right to due process was fulfilled by, among other procedures, the Court of Appeals' own review process.

The Petition cites no case law and no actual facts in support of its new claims of denial of right to jury trial and due process. The Petition ignores facts which rebut such claims. As a result, the Petition should be denied.

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CONCLUSION

Examination of the record and the decision below indicates that the decision of the United States Court of Appeals for the Sixth Circuit is consistent with prior state and federal case law concerning Petitioner's claim of wrongful termination under Michigan law. The record further reveals that the procedure followed by the Federal District Court and the Sixth Circuit Court of Appeals in this matter was consistent with the usual course of judi-

cial proceedings and consistent with the parties' rights to civil trial by jury and due process. The Petitioner having raised no special and important reasons for the granting of the Writ, the Writ should therefore be denied.

Respectfully submitted,

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/s/ By GEORGE M. BROOKOVER
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DATED: December 3, 1987.